

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

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DAVID S. SAVAGE,
Plaintiff,
v.

CASE NO. CIV. S-04-2316 WBS KJM

MEMORANDUM AND ORDER RE:
MOTION FOR SUMMARY JUDGMENT

UNITED STATES OF AMERICA,
Defendant.

UNITED STATES OF AMERICA,
Counterclaim Plaintiff,

v.

DAVID S. SAVAGE and PHYLISS SAVAGE,
Counterclaim Defendants.

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Plaintiff David Savage filed suit against the United States seeking a refund of \$24.14, paid in partial satisfaction of a tax penalty assessed against him as the person responsible for Precision Construction, Inc.'s ("PCI") failure to pay its payroll taxes. The government responded with a counterclaim against plaintiff and Phyliss Savage to reduce PCI's overdue

1 assessments to a judgment against the named parties. The
2 government now moves for summary judgment on its counterclaim
3 against David Savage pursuant to Federal Rule of Civil Procedure
4 56.

5 I. Factual and Procedural Background

6 Plaintiff served as PCI's President and Chief Executive
7 Officer ("CEO") from 1974, when he acquired the company, through
8 December 1998. (Savage Decl. ¶¶ 2-3.) However, citing health
9 problems including obesity, diabetes, high cholesterol, and gout,
10 plaintiff resigned his position as president on December 31,
11 1998. (Id. ¶ 4.) Concurrently, John Allison took over as
12 President¹ and counterclaim defendant Phyliss Savage assumed
13 responsibility for PCI's finances as the new Chief Financial
14 Officer ("CFO").

15 Plaintiff's health problems were not resolved quickly.
16 He suffered a heart attack in February 1999 and an angina attack
17 in September 2000. (Id. ¶¶ 6-7.) On the advice of his doctors,
18 he began an "intensive diet treatment program" that helped him
19 trim down significantly by September 2001. (Id. ¶ 8.) During
20 this time, he was frequently absent from work and did not
21 participate in the day-to-day management of the business. (Id.
22 ¶¶ 6-10.) He did, however, retain the right to sign checks and
23 occasionally exercised this power despite being only marginally
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25 ¹ Pursuant to PCI's articles of incorporation, the same
26 officer serves as both President and CEO. (Def.'s Mem. in Supp.
27 of Mot. for Summ. J. Ex. A-3 at 10 (Articles of Incorporation).)
28 However, as part of the "reorganization" approved at the annual
meeting on December 31, 1998, Allison assumed only the role of
President and plaintiff stayed on as CEO. (Id. Ex. A-10 at 2
(Minutes of the Board of Directors and Shareholders).)

1 involved in the business. (Id. ¶ 5.)

2 PCI struggled financially during plaintiff's absence.
3 Plaintiff learned in March 2001 that the company suffered a
4 "large net operating loss for the year 2000." (Id. ¶ 11.) He
5 also learned at some point that CFO Phyliss Savage failed to pay
6 federal payroll taxes for the last two quarters of 1998 and the
7 first three quarters of 1999. (Id.) Eventually, she resolved
8 these liabilities, but then "began to miss payroll tax payments
9 [again], beginning with the third quarter of 2000 through the end
10 of 2001." (Id. ¶¶ 11, 13.)

11 Plaintiff received multiple notices regarding this
12 second round of delinquent payroll taxes; however, Phyliss
13 assured him that the taxes had actually been paid. (Savage Decl.
14 ¶ 15.) Her accounting books and records, showing that the taxes
15 had been paid in full, were reviewed by PCI's CPA. (Id.)
16 Phyliss also "provided a letter, purportedly from the IRS, but
17 later found to be a forgery, stating that the tax[es,] [through
18 December 31, 2000, were] fully paid." (Id. ¶ 16.) Based on this
19 evidence, plaintiff was persuaded that the matter had been
20 resolved and was under control. (Id. ¶ 17.)

21 Meanwhile, plaintiff resumed active control of the
22 business in August 2001. (Id. ¶ 18.) Discouraged by continuing
23 losses, plaintiff decided to shut down PCI and began selling
24 company assets and settling outstanding accounts. (Id.) As part
25 of this process, he learned in December 2001 that PCI's payroll
26 company, Paychex, had stopped making federal tax deposits "in
27 September" because PCI had insufficient funds. (Id. at 19.)

28 Between August, 2001 and January 9, 2002, plaintiff

1 loaned PCI \$230,000 of his personal funds to pay off existing
2 debts. (Id. at 18.) Two days later, after a visit from Revenue
3 Officer Mike Flath, plaintiff realized that PCI's delinquent
4 payroll taxes dated back to September 2000, not 2001 as he
5 mistakenly believed, based on Paychex's statement in December
6 2001 that it stopped paying the taxes "in September." (Pl.'s
7 Stmt. of Disputed Facts ¶¶ 10-11.) Shortly after the discussion
8 with Officer Flath, plaintiff repaid himself \$70,000, which the
9 government, as the preferred creditor, objected to as violative
10 of 26 U.S.C. § 6672. (Def.'s Mot. to Dismiss 10.)

11 The government now estimates that PCI's unpaid
12 assessments total \$126,103.62. (Reynolds Decl. ¶ 8.) Plaintiff
13 paid \$24.14 on April 23, 2004 and concurrently filed for a
14 refund, alleging that the a portion of the assessment made
15 against him, \$27,332.43, was erroneous and illegal.² (Compl. ¶
16 8.) Several months later, plaintiff filed suit in federal court
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20 ² In his complaint, plaintiff states that on March 15,
21 2004, the government made an assessment against him of only
22 \$27,332.43, which represents the amount owed for the quarter
23 ending on June 30, 2001. However, the government, through its
24 counterclaim and this motion for summary judgment, seeks to
25 recover from plaintiff the entire amount owed, \$130,974.98, which
26 includes missed payments for the last two quarters of 2000 and
27 all four quarters of 2001. (Answer & Countercl. ¶¶ 7-8; Def.'s
28 Mem. in Supp. of Mot. for Summ. J. 12.) The remaining balance
due, plus interest, was \$126,103.62 as of December 31, 2005.
(Reynolds Decl. ¶ 8.) Although the government's counterclaim
seeks recovery from both plaintiff and Phyliss Savage, the
government can, and hereby does, move to hold plaintiff liable
for the entire amount because liability under § 6672 is joint and
several. See Schultz v. United States, 918 F.2d 164, 167 (Fed.
Cir. 1990); Brown v. United States, 591 F.2d 1136, 1142 (5th Cir.
1979); Hartman v. United States, 538 F.2d 1336, 1340 (8th Cir.
1976).

1 pursuant to 26 U.S.C. § 6532(a)(1)³ to collect the refund and
2 abate the tax assessment. (Id. ¶ 11.) The government answered
3 with a counterclaim, seeking to reduce PCI's overdue assessments
4 to a judgment against plaintiff and Phyliss. The focus of the
5 government's instant motion for summary judgment is its
6 counterclaim.

7 II. Discussion

8 A. Legal Standard

9 Summary judgment is proper "if the pleadings,
10 depositions, answers to interrogatories, and admissions on file,
11 together with the affidavits, if any, show that there is no
12 genuine issue as to any material fact and that the moving party
13 is entitled to judgment as a matter of law." Fed. R. Civ. P.
14 56(c). A material fact is one that could affect the outcome of
15 the suit, and a genuine issue is one that could permit a
16 reasonable jury to enter a verdict in the non-moving party's
17 favor. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248
18 (1986). The party moving for summary judgment bears the initial
19 burden of establishing the absence of a genuine issue of material
20 fact and can satisfy this burden by presenting evidence that
21 negates an essential element of the non-moving party's case.

22
23 ³ 26 U.S.C. § 6532(a)(1) provides that:
24 [A] suit . . . for the recovery of any internal revenue
25 tax, penalty, or other sum, shall [not begin] before
26 the expiration of 6 months from the date of filing the
27 [refund] claim . . . unless the Secretary renders a
28 decision thereon within that time, nor after the
expiration of 2 years from the date of mailing by
certified mail or registered mail by the Secretary to
the taxpayer of a notice of the disallowance of the
part of the claim to which the suit or proceeding
relates.

1 Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986).

2 Alternatively, the movant can demonstrate that the non-moving
3 party cannot provide evidence to support an essential element
4 upon which it will bear the burden of proof at trial. Id.

5 Once the moving party meets its initial burden, the
6 non-moving party must "go beyond the pleadings and by her own
7 affidavits, or by 'the depositions, answers to interrogatories,
8 and admissions on file,' designate 'specific facts showing that
9 there is a genuine issue for trial.'" Id. at 324 (quoting Fed.
10 R. Civ. P. 56(e)). The non-movant "may not rest upon the mere
11 allegations or denials of the adverse party's pleading." Fed. R.
12 Civ. P. 56(e); Valandingham v. Bojorquez, 866 F.2d 1135, 1137
13 (9th Cir. 1989). However, any inferences drawn from the
14 underlying facts must be viewed in the light most favorable to
15 the party opposing the motion. Matsushita Elec. Indus. Co., Ltd.
16 v. Zenith Radio Corp., 475 U.S. 574, 587 (1986).

17 The substantive law governing a case determines the
18 materiality of a fact. T.W. Elec. Serv., Inc. v. P. Elec.
19 Contractors Ass'n, 809 F.2d 626, 630 (9th Cir. 1987). Here, the
20 applicable tax law provides, pursuant to 26 U.S.C. § 6672(a),
21 that a person may be liable for penalties assessed against a
22 company that are "equal to the total amount of tax evaded, or not
23 collected, or not accounted for and paid over." A "person" for
24 the purposes of § 6672 includes "an officer or employee of a
25 corporation, or a member or employee of a partnership, who as
26 such officer, employee, or member is under a duty to perform the
27 act in respect of which the violation occurs." 26 U.S.C. §
28 6671(b). Additionally, such individuals must be "responsible"

1 and act wilfully in failing to collect or pay over the withheld
2 taxes. Davis v. United States, 961 F.2d 867, 869-70 (9th Cir.
3 1992).

4 B. Analysis

5 The government here seeks to hold plaintiff personally
6 liable for \$126,103.62⁴ as a "responsible person" who wilfully
7 failed to comply with § 6672. (See Decl. of Richard Reynolds,
8 Ex. FF (Certificates of Assessment and Payment showing the extent
9 of PCI's overdue taxes)). Plaintiff does not dispute the
10 existence or amount of this assessment. Hotly contested however,
11 are the government's assertions that plaintiff was both a
12 "responsible person" and a willful offender.

13 1. Plaintiff as a "Responsible Person"

14 The Ninth Circuit has consistently identified persons
15 who have "the final word as to what bills should or should not be
16 paid, and when" as "responsible" persons under § 6672. Purcell
17 v. United States, 1 F.3d 932, 936 (9th Cir. 1993) (quoting Wilson
18 v. United States, 250 F.2d 312, 316 (9th Cir. 1958)). A person
19 has the final word if that person had "the authority required to
20 exercise significant control over the corporation's financial
21 affairs, regardless of whether he exercised such control in
22 fact." Purcell, 1 F.3d at 937. In other words, responsibility
23 is a matter of status, duty, and authority, not knowledge.
24 Davis, 961 F.2d at 873 (upholding the trial court's finding of
25 "responsible person" based on the plaintiff's position as the

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27 ⁴ This figure does not account for applicable interest
28 that has accrued since December 31, 2005. (See Reynolds Decl. ¶
8 (prospectively calculating interest through the end of the
year).)

1 president, member of the board, and major shareholder, even
2 though the plaintiff had no knowledge of the tax default).
3 "Authority turns on the scope and nature of an individual's power
4 to determine how the corporation conducts its financial affairs;
5 the duty to ensure that withheld employment taxes are paid over
6 flows from the authority that enables one to do so." Purcell, 1
7 F.3d at 936.

8 Plaintiff contests any characterization of himself as a
9 "responsible person" during the relevant time frame, and rather
10 casts himself as passive investor who was plagued by health
11 issues that prevented him from participating in the management of
12 PCI. (Pl.'s Opp'n to Mot. for Summ. J. 7.) Indeed, as a result
13 of his recurring health problems and an intensive weight loss
14 program, plaintiff's physical presence at PCI's corporate office
15 was limited and sporadic.⁵ (Savage Decl. ¶¶ 7-10.) Plaintiff's
16 frequent absences forced the day-to-day management of the company
17 into the hands of Phyliss Savage and John Allison. (Pl.'s Opp'n
18 to Mot. for Summ. J. 2.) However, regardless of these absences,
19 plaintiff does not dispute that, through his title as CEO, he
20 retained significant formal authority in the management of PCI.
21 (Id. at 7-8.) "Courts must look beyond official titles to the
22 actual decision-making process," but they need not ignore them
23 altogether. See Jones, 33 F.3d at 1140.

24 Moreover, plaintiff also describes several instances
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26 ⁵ Plaintiff's absences are allegedly due to an angina
27 attack, a drastic weight loss program necessary to prevent its
28 recurrence, and knee surgery. (Savage Decl. ¶¶ 7-10.) According
to the plaintiff, these maladies forced prolonged absences and,
when his health permitted, 20 hour work weeks. (Id. ¶ 7.)

1 when he exercised his formal authority to control PCI's financial
2 affairs during the time period at issue. First, plaintiff, as a
3 signatory on the corporate checking account, wrote and signed 27
4 checks during the relevant 18 month period.⁶ (Savage Decl. ¶ 5.)
5 Second, starting in "mid-2001," plaintiff instructed his CFO to
6 pay some creditors ahead of others. (Latterell Decl. Ex. AA
7 (Pl.'s Resp. to Def.'s Interrog. No. 8).) Third, plaintiff
8 secured a \$100,000 loan against his personal residence to fund
9 PCI and, on two other occasions, infused personal funds into PCI
10 that were acquired through the sale of his personal property.⁷
11 (Savage Decl. ¶ 12.)

12 In these instances, plaintiff's authority exceeded mere
13 nominal authority. By exercising his ability to write and sign
14 checks, prefer one creditor over another, and supplement
15 corporate accounts with personal funds, plaintiff determined how
16 PCI would conduct its financial affairs. See Hochstein v. United
17 States, 900 F.2d 543 (2d Cir. 1990) (holding that the controller
18 of a business who had check-signing authority, made the initial
19 determination of the order in which bills were to be paid, and
20 who requested funds on behalf of the business, is a "responsible
21 person" under § 6672). It is of no consequence that this power
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23 ⁶ Plaintiff asserts that his prolonged absences and
24 deficiencies in computer training impeded his check-writing
25 ability. (Savage Decl. ¶ 5). However, in light of plaintiff's
admitted successful exercise of check writing power, this
argument is irrelevant.

26 ⁷ Plaintiff's deposition testimony further reveals that
27 he "participated any time a vehicle was bought", that he was
28 responsible for signing loan security agreements from 1999
through 2001, and that he paid a property tax bill for PCI in
March, 2001. (Savage Decl. Ex. 2 (David Savage Dep. 53: 14, 20-
23 and 59:9-16).)

1 was exercised infrequently as long as the plaintiff possessed
 2 this power during the relevant period. Purcell, 1 F.3d at 937
 3 ("That an individual's day-to-day function in a given enterprise
 4 is unconnected to financial decision making or tax matters is
 5 irrelevant where that individual has the authority to pay or to
 6 order the payment of delinquent taxes."). Plaintiff thus
 7 undisputedly possessed the authority required to exercise
 8 significant control over the corporation's financial affairs at
 9 different times throughout the period at issue.⁸ These facts
 10 thus establish that plaintiff was a "responsible person" under §
 11 6672 for all six quarters. Cf. Schlicht v. United States, No.
 12 03-1606, 2005 WL 2083103, at *3 (D. Ariz. Aug. 25, 2005) (holding
 13 that a corporation's president, who "was charged with 'general
 14 active management' . . . , had check signing authority, hired and
 15 fired employees, and on at least one occasion . . . paid trust
 16 fund taxes" was a responsible party even though he did not
 17 exercise his authority over finances on a regular basis).

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19
 20 ⁸ Significantly, plaintiff does not offer any evidence
 21 that he lacked the authority to pay PCI's taxes. See Alsheskie
 22 v. United States, 31 F.3d 837, 839 (9th Cir. 1994)
 23 (distinguishing the district court's finding that the plaintiff
 24 was not a responsible party from a case where "the record
 25 contained no evidence that . . . the responsible party[] was
 26 without authority to pay the taxes."). His arguments regarding
 27 his responsibility focus almost entirely on his inability to
 28 exercise his authority during his health-related absence. (Pl.'s
 Opp'n to Mot. for Summ. J. 9). This argument misses the mark.
 The "responsibility" prong of the liability analysis addresses
 only the existence of authority; the "willfulness" prong
 considers the ability of the individual to act upon his
 authority. See Phillips v. IRS, 73 F.3d 939, 943 (9th Cir. 1995)
 (addressing the absence caused by an individual's paralysis as
 part of the "willfulness" element in § 6672); Keith v. United
States, No. BK-76-1342, 1978 WL 1160, at *8 (E.D. Va. Feb. 21,
 1978) (plaintiff's medical excuse did not negate wilfulness).

1 2. Plaintiff's Willfulness

2 Willfulness, under § 6672, has long been defined as "a
3 voluntary, conscious and intentional act to prefer other
4 creditors over the United States." Purcell, 1 F.3d at 938
5 (quoting Davis, 961 F.2d at 871). Willfulness does not require
6 the intent to defraud the government or any other bad motive.
7 Davis, 961 F.2d at 871. "Once a responsible person gains
8 knowledge of a payroll tax deficiency, he is liable for all
9 periods during which he was a responsible party, regardless of
10 whether those periods precede or follow the date he gained that
11 knowledge." Schlicht, 2005 WL 2083103, at *4 (citing Davis, 961
12 F.2d at 873). Accordingly, a deliberate decision to use
13 corporate funds after receiving knowledge of a payroll tax
14 deficiency "falls within the literal terms of this Circuit's
15 definition of willfulness." Davis, 961 F.2d at 871; see also
16 Thomsen v. United States, 887 F.2d 12 (1st Cir. 1989) (holding
17 that once a person is aware of the liability to government, that
18 person has a duty to ensure that the taxes are paid before any
19 payments are made to other creditors (citing Mazo v. United
20 States, 591 F.2d 1151, 1157 (5th Cir. 1979)).

21 Plaintiff contends that his physical ailments raise a
22 genuine issue of material fact as to whether he could exert
23 control over the payroll taxes and intentionally withhold
24 payment. (Pl.'s Opp'n to Mot. for Summ. J. 10.) Likewise,
25 plaintiff contends there is a genuine issue of material fact as
26 to whether Phyliss Savage successfully misled him into a
27 reasonable belief that there was no payroll tax deficiency. (Id.
28 at 11.) Because these circumstances could bear on whether

1 plaintiff willfully, voluntarily, or intentionally ignored his
2 duty to pay PCI's taxes, factual questions remain as to whether,
3 prior to January 11, 2002, plaintiff acted willfully. See United
4 States v. Rem, 38 F.3d 634, 644 (2d Cir. 1994) ("Where . . . the
5 individual's position makes his claim of ignorance of nonpayment
6 plausible and there are no other indicia of knowledge, the matter
7 of his willfulness is an issue to be tried.").

8 However, these arguments are not material to
9 plaintiff's willfulness after January 11, 2002, given that
10 plaintiff was undisputably aware of the unpaid employment taxes
11 from that day forward. (Savage Decl. ¶ 19.) Significantly then,
12 despite this knowledge, plaintiff, who had personally loaned the
13 corporation \$230,000, repaid himself \$70,000 "after [he] became
14 aware that [PCI] had tax problems." (Latterell Decl. Ex. CC
15 (David Savage Dep. 88:5-18, Aug. 18, 2005) (emphasis added).)
16 Through this act, plaintiff consciously and intentionally
17 preferred himself, as a creditor, over the United States.

18 These facts are determinative of plaintiff's liability
19 because once a responsible person consciously and intentionally
20 prefers another creditor over the United States, factual issues
21 as to prior ignorance of non-payment are irrelevant. Teel v.
22 United States, 529 F.2d 903, 905-06 (9th Cir. 1976) (holding that
23 the use of funds received from the sale of old inventories and
24 the sale of new merchandise, after knowledge of arrearages in
25 employee tax payments, forecloses an inquiry into prior ignorance
26 regarding the willfulness element of § 6672). Plaintiff
27 therefore cannot rely on his previous physical inability to pay
28 the deficient taxes or his previous ignorance of the deficient

1 taxes to evade liability, even assuming that he could prove these
 2 theories at trial. As a matter of law, plaintiff acted willfully
 3 in accordance with § 6672.⁹ Pursuant to Davis, this finding of
 4 willfulness extends to all quarters where plaintiff was a
 5 responsible person, or all six quarters in issue.

6 At oral argument, plaintiff's attorney vigorously took
 7 the position that plaintiff should at most be liable for \$70,000,
 8 rather than the full amount of the tax delinquency, because he
 9 only willfully preferred other creditors by this amount. (See
 10 also Pl.'s Opp'n to Mot. for Summ. J. 12 n.10.) The court is
 11 aware that some courts have limited a responsible person's
 12 liability to the extent that the corporation had funds available
 13 to pay the government when that person first learned of the
 14 delinquency. See, e.g., Kinnie v. United States, 994 F.2d 279,
 15 285 (6th Cir. 1993); Ross v. United States, 949 F. Supp. 536, 543
 16 (D. Ohio 1996) (citing Gephart v. United States, 818 F.2d 469
 17 (6th Cir. 1987)). Under this approach, the fact that the court
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19 ⁹ Plaintiff argues for an application of the exception to
 20 § 6672 liability recognized by the Supreme Court in Slodov v.
 21 United States, 436 U.S. 238 (1978). That exception, however,
 22 applies only in situations where new management of a corporation
 23 assumes control after the failure to collect and withhold
 24 employment taxes has occurred. Slodov, 436 U.S. at 259-60.
 25 Moreover, at the time the new management assumes control, there
 26 can be no funds available to satisfy the obligation to the
 27 government and subsequently generated funds cannot be directly
 28 traceable to the withheld employment taxes. Id. In the instant
 case, plaintiff remained in management as a responsible person
 from the time the withholding tax obligation arose until the time
 it was willfully avoided. "In the case of individuals who are
 responsible persons both before and after withholding tax
 liability accrues . . . there is a duty to use unencumbered funds
 acquired after the withholding obligation becomes payable to
 satisfy that obligation; failure to do so when there is knowledge
 of the liability . . . constitutes willfulness." Purcell, 1 F.3d
 at 938 (quoting Davis, 961 F.2d at 876).

1 only has evidence that \$70,000 was available to pay PCI's debts
2 on January 11, 2002 would be significant.

3 However, in Davis, 961 F.2d at 871, the Ninth Circuit
4 noted that the taxpayer "had sufficient income to satisfy in full
5 [the corporation's] tax delinquency" but also stated that the
6 decision "to pay commercial creditors rather than to diminish
7 [the corporation's] tax debt falls within the literal terms of
8 the Circuit's definition of willfulness." (emphasis added); see
9 also Sorenson v. United States, 521 F.2d 325, 328 n.3 (9th Cir.
10 1975) (suggesting that inability to pay is not relevant in a §
11 6672 willfulness assessment). Thus, the Ninth Circuit has
12 declined to take the approach of limiting liability for
13 willfulness to the amount available to the corporation at the
14 time other creditors were preferred over the government.¹⁰

15 Allowing plaintiffs to discount their liability based
16 on the amount they actually wrongfully divert to other creditors
17 would seem to be inconsistent with the language of the statute,
18 which punishes any attempt to evade payment of the tax owed with
19 "a penalty equal to the total amount of the tax evaded[] or not
20 collected" 26 U.S.C. § 6672(a) (emphasis added).

21 Moreover, although it is often the case that the assets wrongly
22 and willfully diverted to creditors other than the United States
23 would have been sufficient to cover the corporation's entire §
24 6672 tax liability, the court is not aware of any case where a

25
26 ¹⁰ If there were any doubt about this result, it has been
27 made explicit in an unpublished decision which this court is not
28 permitted to cite, in which the Ninth Circuit expressly rejected
a request to limit liability to the amount available to the
corporation at the time the plaintiff willfully preferred other
creditors.

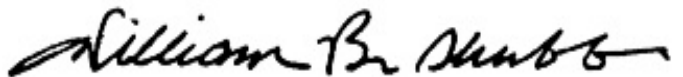
1 responsible party preferred other creditors and escaped liability
2 for the total amount owed because the corporation, at the time,
3 could not have paid its entire debt anyway. But cf. Alabama v.
4 King, No. 91-B-2121-S, 1995 WL 423171, at *7 (N.D. Ala. Mar. 29,
5 1995) (holding plaintiff liable for the full amount owed even
6 though, at the time plaintiff preferred other creditors, the
7 company only had "nearly the sufficient unencumbered funds with
8 which [plaintiff] could have paid the state and federal tax
9 liabilities" (emphasis added)).

10 III. Conclusion

11 As a matter of law, plaintiff is a "responsible person"
12 who willfully avoided federal tax obligations under § 6672. In
13 accordance with that section, plaintiff can be personally liable
14 for the outstanding assessments owed by PCI, in the amount of
15 \$126,103.62, plus interest accrued during the pendency of this
16 motion until paid, pursuant to 26 U.S.C. §§ 6601, 6621-22 and 28
17 U.S.C. § 1961(c).

18 IT IS THEREFORE ORDERED that defendant's motion for
19 summary judgment on its counterclaim against plaintiff be, and
20 the same hereby is, GRANTED.

21 DATED: February 21, 2006

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24 WILLIAM B. SHUBB
25 UNITED STATES DISTRICT JUDGE
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